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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1968

ARTHUR GROSS, *et al.*,

Petitioners,

against

THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The only question presented by the petition is whether this Court should grant a writ of certiorari prior to decision in the Court of Appeals where (1) the sole ground asserted for granting that writ is the pendency in this Court of an appeal brought by the Department of Justice raising identical issues and (2) where there is no showing, as required by Rule 20, that the case is of "such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

Statement of the Case

On May 13, 1974, the Department of Justice docketed an Expediting Act appeal in *United States* v. *National Association of Securities Dealers, Inc., et al.*, No. 73-1701. On July 15, appellees named therein filed motions to affirm the judgment of the United States District Court for the District of Columbia. That court had dismissed the Department's civil antitrust suit as well as the present private class action and another private lawsuit, all of which raised identical issues. Notices of appeal were filed in the two private actions in the Court of Appeals for the District of Columbia Circuit, and these appeals have been stayed.*

The District Court dismissed all three actions, and stayed the others, on the purely legal grounds that the Investment Company Act of 1940 both expressly and implicitly authorized the narrowly defined practices challenged and that the pervasive administrative scheme created by the securities laws precluded antitrust scrutiny of these particular practices.

Argument

Respondents, who are also the appellees in No. 73-1701, will not here reiterate the reasons advanced in their motions to affirm in No. 73-1701 why the decision below does not merit review in this Court. This response is addressed solely to the question whether this Court should, in the event that it notes probable jurisdiction in No. 73-1701, also grant certiorari to these petitioners prior to judgment in the Court of Appeals.

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* The District Court had also stayed proceedings in a number of related private actions raising the same issues.

Petitioners do not claim that their writ meets the requirements of Rule 20. And it does not. One cannot compare the present situation with the kind of rare cases in which this Court has granted review prior to judgment in the Court of Appeals. See e.g., *United States* v. *Nixon*, —— U.S. —— (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936).

Nor do the three cases cited by petitioners support their position. Those cases presented in emergency context such pressing public issues as the viability of the government's internal security program, *Taylor* v. *McElroy*, 360 U.S. 709 (1959); the ability of the Civil Rights Commission to function, *Hannah* v. *Slawson*, 363 U.S. 420 (1960); and the legality of the largest railroad merger in American history, *New Haven Inclusion Cases*, 399 U.S. 392 (1970).*

Nor is there reason to stretch the Rule to include this case. Petitioners add nothing new to the appeal now before the Court. They do not allege that their factual situation is special. They raise no issues not already raised in No. 73-1701. They concede that their complaint alleged the "same violations" of law asserted by the Department of Justice. They named the same defendants and they concede that "the identical issues presented by the instant petition are already before this Court." Petition, p. 10.

* Other special circumstances not present here also warranted review prior to judgment below in the three cited cases. *Taylor* provided a second factual context against which the Court could consider the constitutional questions raised in the already pending case. In *Hannah*, the Civil Rights Commission was the petitioner in both cases, one of which challenged the Civil Rights Act itself while the other focused on procedural rules. And in the *New Haven Inclusion Cases*, two federal courts had reached different results in appraising the same railroad property.

Examination of the "questions presented" portion of the petition reveals that it tracks the jurisdictional statement in No. 73-1701, and petitioners' complaint duplicates that of the United States except for its class action and damages allegations. Petitioners supply no reason to believe they have a distinct contribution to make to the resolution of the case presented by the Solicitor General.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari prior to judgment in the Court of Appeals should be denied.

Respectfully submitted,

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